## APPENDIX A

**Opinion of the Third Circuit Court of Appeals**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 81-1928

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HOWARD E. PFEIFER

*v.*

JONES & LAUGHLIN STEEL CORPORATION
Owner or owner pro hac vice of
Barges 1011, 1384, 1400, 1363, and
others in a fleet,

*Appellant*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA-PITTSBURGH
(D.C. Civil No. 79-1597)

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Argued March 18, 1982

Before: ALDISERT, VAN DUSEN, and GARTH,
*Circuit Judges*

(Filed April 16, 1982)

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Robert W. Murdoch, Esquire (Argued)
Jones, Gregg, Creehan & Gerace
1010 Grant Building
Pittsburgh, Pennsylvania 15219
*Counsel for Appellant*

Jerome M. Libenson, Esquire (Argued)
Baskin and Sears, P.C.
10th Floor, Frick Building
Pittsburgh, Pennsylvania 15219
*Counsel for Appellee*

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

ALDISERT, *Circuit Judge.*

Jones & Laughlin Steel Corporation appeals from a judgment in favor of plaintiff Howard E. Pfeifer in a third-party negligence action under the Longshoremen's and Harbor Workers' Compensation Act. The major question presented is whether the district court erred in applying the "total offset method" as a federal rule of damages, wherein the discount factor used to reduce future earnings to present worth is presumed offset by future inflation. We find no error and affirm.

I.

Pfeifer was employed by appellant Jones & Laughlin (J&L) as a landing helper on its coal barges. On January 13, 1978, he slipped and fell because of ice and snow that had accumulated on the gunnel of a barge on which he was working. He struck a barge rail and landed on his tailbone, and a heavy electric motor that he was carrying fell in his lap. He has not returned to work since the accident. He has been examined by a number of physicians, several of whom testified at the trial, and he has undergone extensive physical therapy.

The district court found that appellant was negligent and that its negligence was the proximate cause of Pfeifer's accident and resulting injury. It determined further that Pfeifer was completely disabled from the date of the accident until July 1, 1979, and that thereafter he was capable of doing "light work" and lifting weights of up to twenty-five pounds, but that he could not work on the river. Appellant has not offered Pfeifer a job of any type since his injury, and the parties have not discussed the availability of a light duty position.

Relying on our decisions in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir.

1979), *vacated*, 451 U.S. 965 (1981), *reinstated on remand*, 657 F.2d 25 (3d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3377 (U.S. Oct. 29, 1981) (No. 81-826); and in *Blair v. United States Steel Corp.*, 444 F.2d 1390 (3d Cir. 1971) (per curiam), *cert. denied*, 404 U.S. 1018 (1972), the district court determined that as a vessel owner *pro hac vice*, appellant was liable for negligence under §5(b) of the Longshoremen's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §905(b). In measuring damages, it declined to consider future wage increases or to discount the award to present value, citing *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). The court multiplied Pfeifer's 1978 annual wage by his work life expectancy, deducted the amount of compensation Pfeifer had received under LHWCA, and subtracted his projected earnings at minimum wage from July 1, 1979, until his sixty-fifth birthday, taking judicial notice that the federal minimum wage at the time of the accident was $2.90 per hour.

On appeal, J&L does not challenge the district court's findings that it was negligent and that its negligence was the proximate cause of Pfeifer's injury, nor does it contend that it was not correctly found to be an owner *pro hac vice* under the standards set forth in *Blair*, 444 F.2d at 1391. It argues, however, that because Pfeifer was its employee he does not have a cause of action for negligence under §5(b) of LHWCA. It argues also that the district court erred in applying the Pennsylvania damages test of *Kaczkowski*, and further in factoring damages on the basis of the minimum wage rate instead of wages for light duty.

II.

We quickly dispose of appellant's argument that the district court erred in allowing Pfeifer to proceed in a negligence action against his own employer under §5(b) of LHWCA. J&L reads §5(a) as an absolute limitation on

a longshoreman's right to sue his employer under §5(b): unless the employer has failed to secure payment of compensation as required by §4 of LHWCA, 33 U.S.C. §904, it cannot be held liable as a third party under §5(b). We carefully considered the identical argument in light of the 1972 LHWCA amendments in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31, 38-44 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (*Griffith* I); and we concluded that we remain bound by the Supreme Court's decision in *Reed v. The Yaka*, 373 U.S. 410 (1963), which held that §5(a) (then §5) does not bar a suit against an owner *pro hac vice* who also is an employer liable for compensation. *Griffith* I requires us to reject J&L's argument in this case.

III.

Appellant next argues that the district court erred in its calculation of damages by applying the rule announced in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980). It contends that damages in an LHWCA case must be computed according to a uniform federal standard; and that federal law requires that a lump sum award for lost future earnings be reduced to present value, a practice effectively abolished in Pennsylvania by the decision in *Kaczkowski*. To meet this contention, we must explore the developing law of damages in state and federal decisions in light of controlling legal precepts and prevailing economic conditions.

A.

But first we must make the preliminary determination of what precise aspect of the damage issue has been preserved for appeal. Our examination of the record persuades us that appellant has not preserved for review its

contention that the court erred in applying Pennsylvania law because it felt obliged to apply state law, rather than federal law. It was the plaintiff's position at trial that federal law controlled damages and that inflation was a valid consideration under federal law. Appellant did not seem to challenge this position except to suggest that evidence of inflation had to be introduced by expert testimony and that future earnings had to be reduced to present worth:

> MR. MURDOCH: We're here today under a Federal statute under Federal law and I don't think that the finding of the Pennsylvania Supreme Court in the recent case regarding not reducing damages to present worth is applicable in this particular case.
>
> THE COURT: We may have to have a little argument on that at some point.
>
> MR. MURDOCH: Yes, sir.
>
> MR. LIBENSON: Under Federal law, you can add inflation.
>
> MR. MURDOCH: If we have expert testimony.
>
> THE COURT: That's a little bit down the road and we'll wait on that.

App. at 43a.

Standing alone, the court's damages discussion in its opinion, *id.* at 492-93a, may be considered ambiguous; without more, it could be argued that the court was of the view that although this was a federal claim brought in a federal court in Pennsylvania it was required to apply the state law of damages. But when the opinion is read in conjunction with the earlier dialogue between the court and counsel, we are persuaded that the court applied federal law and that the dispute between the parties at trial was limited to the proper federal measure of damages. We conclude that appellant has preserved for review only the question of the proper elements in the federal law of damages under the circum-

stances of this case.[1] It is to this analysis that we now turn.

B.

Our starting point is the recognition that Article III, §2 of the Constitution, in extending the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction,"

> referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

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1. For a reviewing court to determine that there is reversible error, three critical prerequisites must be implicated in the judicial error-correcting process. It is necessary that there be (a) specific acts or omissions by the trial court constituting legal error, (b) properly suggested as error to the trial court, and (c) if uncorrected on that level, then properly presented for review to the appellate court. For there to be *reversible* error, it is mandatory for the appellant properly to identify the error to the trial court and to suggest a legally appropriate course of action. The reasons for this requirement go to the heart of the common law tradition and the adversary system. It affords an opportunity for correction and avoidance in the trial court in various ways: it gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action; and it provides the trial court with the alternative of altering or modifying a decision or of ordering a more fully developed record for review. This philosophy is embodied in the Federal Rules of Civil Procedure. Thus, Rule 46 requires a party to "mak[e] known to the court the action which he desires the court to take or his objection to the action *and his grounds therefor*." (Emphasis supplied.)

*Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917) (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).[2] We must, therefore, apply a uniform federal rule; and our decision is not controlled, as in diversity cases, by the law of the underlying state.

This recognition is not the end of the analysis, however, but only the beginning. It is not unusual for a federal court to borrow substantive state law and adopt it as federal law. As expressed by Justice Jackson, a federal court addressing a federal question that cannot be answered by reference to federal statutes alone is "free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law." *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 472 (1942) (concurring opinion); *see id.* at 469.[3] No rule of

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2. *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953) (plaintiff's "right of recovery for . . . negligence is rooted in federal maritime law"); 1A Benedict on Admiralty §2 at 1-4 (7th ed. 1981) ("the maritime law must be uniform throughout the nation and state legislation may not introduce disharmonious elements"); H.R. Rep. No. 1441, 92d Cong., 2d Sess. ——, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4705 ("The Committee intends that legal questions which may arise in actions brought under [the 1972 amendments to LHWCA] shall be determined as a matter of Federal law").

3. *See also, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976), which held that the same considerations of public policy that underlie the common law rule of absolute immunity of state prosecutors from tort liability countenance absolute immunity under 42 U.S.C. §1983; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 390-93 (1970), relying on state wrongful death statutes in recognizing a right of action for wrongful death under federal maritime law; *Monroe v. Pape*, 365 U.S. 167, 187 (1961), holding that 42 U.S.C. §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions;" *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957), which held that in fashioning substantive federal law under §301 of the Labor Management Relations Act, 29 U.S.C. §185, "state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy;" and *United*

state law applies of its own force to compel a particular decision; but we may resort to a rule derived from any source, state, federal, or foreign, if its intrinsic wisdom commends it to the case at hand. Once we have transplanted to federal soil a rule previously adopted by a state court, however, it takes on a new life of its own and grows independently of further modifications or refinements announced by the court which first gave it root. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *D'Oench, Duhme*, 315 U.S. at 469 (Jackson, J., concurring).

Accordingly, we find no jurisprudential impediment to adoption of the state measure of damages. We now turn to prudential and consequential considerations, and we must respect the important concerns of consistency and coherence in the law of damages.

C.

Prior to 1980, the Pennsylvania law of damages for torts did not take into account the pernicious presence of inflation. Thus in 1976 the Pennsylvania Superior Court was of the view that "the erratic behavior of the economy over the past half dozen years, plagued by war and other unusual circumstances, is not a sufficient demonstration that inflation at any predictable rate will continue for another twenty years." It thus dismissed consideration of inflation as "speculative." *Havens v. Tonner*, 243 Pa.Super. 371, 378, 365 A.2d 1271, 1274 (1976). In 1980, however, Pennsylvania's highest court concluded.

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NOTE — *(Continued)*
*States v. Hext*, 444 F.2d 804, 809-11 (5th Cir. 1971), looking to Article 9 of the Uniform Commercial Code as a source of federal common law governing suits arising from Farmers' Home Administration secured loan transactions, under the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

"in light of clear scientific evidence of the fact that inflation . . . [has] become an established part of our economy," that this factor must be considered in awarding damages for lost future earnings. *Kaczkowski*, 491 Pa. at 566-67, 421 A.2d at 1030.[4] It held that continued judicial refusal to recognize the impact of inflation, while maintaining the practice of discounting lump sum awards to "alleged present value," *id.* at 570, 421 A.2d at 1032, would "ignore our responsibility to attempt to 'graduate the amount of the damage award exactly to the extent of the loss.' " *Id.* at 571, 421 A.2d at 1032 (quoting *Forsyth v. Palmer*, 14 Pa. 96, 97 (1850)).

In a most persuasive opinion, replete with relevant and credible economic data, *see, e.g., id.* at 572-74 nn. 11-15, 580-81, 421 A.2d at 1033 nn. 11-15, 1037, the court declared:

> Despite the uninformed belief of the [*Havens*] court, inflation and productivity factors are not speculative and are capable of definition and prediction by economic experts. For decades, economists

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4. Writing for the court, Justice Nix defined inflation as follows:

> Inflation is "the increase in the volume of money and credit relative to available goods resulting in a substantial and continuing rise in the general price level." Websters, Third International Dictionary (1965). Inflation gains are measured in terms of what the average person refers to as "cost of living increases." An example of inflation evidencing an increase in prices unrelated to an increase in intrinsic value is that the juice content of oranges has not increased in years, but their price continues to rise.
>
> The presence of inflation plays two distinct roles in an award for prospective damages. The first role is determining the impact of inflation on the future earnings of the victim. The second place in which inflation plays a part is in determining the appropriate interest rate to discount the future damage award to its present value.

491 Pa. at 565 n.4, 421 A.2d at 1029 n.4.

> have been refining tools to forecast economic growth and have used these tools with proven accuracy. Sophisticated economic forecasts are relied upon by every major government agency, corporation, and financial institution. These forecasts are based upon all that is known in the American economy and despite small tolerances of error, these projections have been accurate in the past. *See, District of Columbia v. Barriteau*, D.C.App., 399 A.2d 563, 566 (1979). Thus, there exists a reasonable basis in fact for this court to consider the impact of inflation and productivity on lost future earnings. A court has a responsibility to the citizenry to keep abreast of changes in our society. In light of the recognized acceptance of the science of economics, the courts of this Commonwealth can no longer maintain their ostrich-like stance and deny the admissibility and relevancy of reliable economic data concerning the impact of productivity and inflation on lost future earnings. Indeed, to ignore economic realities and presume that there will be no changes in an individual's future earnings because of such factors is further removed from reality than any variance that may result from our efforts to predict these factors.

*Id.* at 572, 421 A.2d at 1032-33.

But the 1980 Pennsylvania decision was not without formidable precedent. In the post World War I inflationary period, over a half century ago, the Vermont Supreme Court cited extensive authority for considering inflation in awarding damages:

> The result sought by the law in assessing damages in [tort] cases is compensation — so far as a money payment can — the ascertainment of such a sum as will compensate the plaintiff for the injury. Necessarily, damages are to be expressed in terms of money. . . . As a medium of exchange, its value

> appreciates or depreciates according to the rise and fall in commodity prices. So it is that, at least so far as those elements of damages properly classed as pecuniary losses — like loss of time, loss of earning power, expenses and the like — are concerned, it is proper for the jury to take into consideration the fact, known to everybody, that the purchasing power of money is at present seriously impaired.

*Halloran v. New England Telephone & Telegraph Co.*, 95 Vt. 273, ——, 115 A. 143, 144 (1921).[5]

Moreover, state judges have not been alone in recognizing, in Justice Roberts' words, that "the orderly development of the law must be responsive to new conditions and to the persuasion of superior reasoning." *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 23, 203 A.2d 796, 806 (1964). Over 20 years ago, in a case under the Federal Employers' Liability Act, Judge Friendly wrote that "there is little or no authority in favor of charging the jury to take future inflation into account," but he recognized that "there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity." *McWeeney v. New York, N.H. & H. R.R. Co.*, 282 F.2d 34, 38 (2d Cir.) (in banc), *cert. denied*, 364 U.S. 870 (1960). Eleven years later, in a longshoreman's personal injury case, Judge Friendly noted that "if inflation should continue at its present pace, courts may have to reconsider the propriety of the long recognized charge with respect to discount." *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 79 (2d Cir. 1971) (citing McWeeney).[6] More recently, in

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5. A comprehensive list of state cases is set forth in *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271, 1290 (D.Conn. 1974), *aff'd in pertinent part*, 524 F.2d 384 (2d Cir. 1975). *See also* Annot., 12 A.L.R.2d 611.

6. The court in *Yodice* declined to undertake the suggested reconsideration because "the complete absence of economic data in

*Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 36 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981), a second circuit panel in an LHWCA case surveyed the economic literature demonstrating the persistence of strong inflationary pressures and held that "inflation should be considered in estimating the present value of lost future wages." *See also, e.g., Steckler v. United States*, 549 F.2d 1372, 1375-78 (10th Cir. 1977) (Federal Tort Claims Act); *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 308-11 (5th Cir. 1976) (Wisdom, J., specially concurring) (admiralty); and *United States v. English*, 521 F.2d 63, 72-76 (9th Cir. 1975) (Tort Claims Act). And the virulent influence of inflation was strikingly brought home to federal judges in *The Report of the Commission on Executive, Legislative, and Judicial Salaries* (December, 1980) at 7-9. The report disclosed the following:

- From 1969 to 1980, the Consumer price index rose by more than 130 per cent.
- During the same period, the Hourly Earnings Index, which reflects wage rates in the private, non-farm economy, also rose by more than 130 per cent.
- The 1980 $57,500 salary for U.S. Circuit Judges amounted to $24,400 in terms of 1969 dollars or a reduction of 43 per cent.

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NOTE — *(Continued)*

the present record and the relatively small loss of future earnings" made it "difficult to imagine a case which would be a more inappropriate vehicle for that purpose." 443 F.2d at 79. Given the extensive subsequent development in the common law, the present economic certainty of continuing inflation, and the careful presentation of the issue in an adversarial context in this case, we are not now limited by the factors that properly counselled restraint in *Yodice*; and we believe that the time has arrived for the reconsideration invited in that decision.

Notwithstanding the reticence of the courts in an earlier era, it cannot be argued effectively today that inflation has been only a temporary phenomenon on the American scene. If this reality of modern economic life can be considered in calculating damages without resorting to speculation, it should be conceded that when relevant, consideration of inflation qualifies under the criteria of "justice," "common sense," and "public policy" generally used by the courts in evaluating the consequences of embracing a new and attractive rule of law — what legal philosophers are wont to describe as "utilitarian" in the Benthamite scale of supposedly measurable aggregates of pleasures and pains.[7] If the spectre of "speculation" is removed, a matter we shall address later, our immediate task is to determine whether the *Kaczkowski* formula is congruent with the federal law of damages in maritime cases. We believe it is.

D.

The relevant federal law of damages is familiar and uncomplicated, and is not materially different from comparable state law. This court carefully surveyed the case law and delineated the permissible elements of recovery in *Downie v. United States Lines Co.*, 359 F.2d 344, 347-48 (3d Cir.) (in banc), *cert. denied*, 385 U.S. 897 (1966). We adhered in that decision to the general rule that a seaman injured by the tortious conduct of his employer is entitled to an award of damages commensurate with the nature and extent of his injuries. He is entitled to reimbursement for his loss of earnings, past and prospective; for any impairment of his earning capacity; for medical expenses incurred and to be incurred; and for any other economic loss he may have sustained or is likely to sustain. He is also entitled to redress for his

7. *See* N. MacCormick, Legal Reasoning and Legal Theory 105 (1978).

physical injury, including the effects thereof, such as pain, suffering, mental anguish, discomfort, and inconvenience. If the injuries are permanent and result in an impairment of earning capacity, he may recover damages for such impairment, including (but not limited to) his probable loss of future earnings. Damages resulting from the impairment of earning capacity and the probable loss of earnings must be measured on the basis of life expectancy at the time of injury. The award must be based upon the probable pecuniary loss reduced to its present net worth. The injured worker is also entitled to compensation, again based on life expectancy at the time of the injury, for the physical and mental effects of the injury on his ability to engage in those activities which normally contribute to the enjoyment of life, including, for example, his avocations. The specific elements of such an award necessarily depend upon the proofs. There are no precise criteria by which these elements may be evaluated, but they are measurable to the same extent as pain, suffering, and mental anguish.

Full compensation for lost prospective earnings is most difficult, if not impossible, to attain if the court is blind to the realities of the consumer price index and the recent historical decline of purchasing power. Thus if we recognize, as we must, that the injured worker is entitled to reimbursement for his loss of future earnings, an honest and accurate calculation must consider the stark reality of inflationary conditions.

IV.

What had troubled the courts for years was the speculative nature of predicting future inflationary trends. The Pennsylvania Court has not only recognized this problem but met it head on by adopting what is known as the "total offset method," a variation of methods introduced by the federal district court in *Feldman v. Allegheny Airlines, Inc.*, 382 F.Supp. 1271 (D.Conn.

1974), *aff'd in pertinent part*, 524 F.2d 384 (2d Cir. 1975), and the Alaska Supreme Court in *Beaulieu v. Elliott*, 434 P.2d 665 (1967), and *State v. Guinn*, 555 P.2d 530 (1976). The total offset method avoids the danger of speculating as to the future rate of inflation by making what we consider a very sensible accommodation: it assumes that in the long run the effects of future inflation and the discount rate will co-vary significantly with the other. *See* authorities cited in *Kaczkowski*, 491 Pa. at 581, 421 A.2d at 1037. Moreover, we are impressed by the pragmatic considerations embraced by the Pennsylvania court:

> An additional virtue of the total offset method is its contribution to judicial efficiency. Litigators are freed from introducing and verifying complex economic data. Judge and juries are not burdened with complicated, time consuming economic testimony. Finally, by eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable.

*Id.* at 583, 421 A.2d at 1038.

We are impressed by the "total offset method" because it both accommodates the reality of inflation and bids fealty to the concept of reducing future earnings to present worth. It makes a judgment — evaluative to be sure, but no better or no worse than the varying prognostications of expert witnesses — that the rate of future inflation will be equivalent to future interest rates. From a pragmatic viewpoint, lost future earnings need not be discounted to present value, although the formula calls for a theoretical reduction to present worth, because the inflation and discount rates are legally presumed to be equal and cancel one another.

We find the foregoing analysis coherent and consistent with the elements of damages discussed in previous case law. It does not contradict valid and binding rules of our court. The total offset formula embodies the

continued requirement of reduction to present worth, *see Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 (1916); *Downie*, 359 F.2d at 347, and it avoids considerations that would tend to introduce an illicit speculative element into the computations. Indeed, by eliminating the discount factor from the jury's or the court's calculations, the total offset method will tend to eliminate the necessity for speculation, to introduce greater certainty into the parties' own calculations, and thereby perhaps to facilitate settlement of personal injury claims without the necessity of judicial intervention. We therefore hold that the district court did not err in computing damages for the loss of future earnings, because it is not necessary to go through the process of discounting lump sum awards to theoretical present value; the discount factor is presumed equal to and offset by the impact of inflation on the future economic value of the award.

V.

Appellant's final contention is a challenge to the factual predicate of the court's computation of projected earnings. It argues that the court erred in using the minimum wage as a factor instead of the wage J&L pays its light duty employees. At bottom this is a question of fact finding reviewed under the "clearly erroneous" standard. Fed. R. Civ. P. 52(a); *see Krasnov v. Dinan*, 465 F.2d 1298, 1302-03 (3d Cir. 1972). We do not view the findings as clearly erroneous.

VI.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 81-1928

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HOWARD E. PFEIFER,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Owner or owner *pro hac vac vice* of Barges
1011, 1384, 1400, 1363, and others in a fleet,
*Appellant.*

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(D. C. Civil No. 79-1597)

On Appeal from the United States District Court
for the Western District of Pennsylvania.

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Present: Aldisert, Van Dusen and Garth,
*Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 18, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 16, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:
SALLY MRVOS
*Clerk.*

April 16, 1982.

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

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FOR THE THIRD CIRCUIT

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*v.*

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Owner or owner pro hac vice of
Barges 1011, 1384, 1400, 1363, and
others in a fleet,

*Appellant*

(W.D. Pa. (Pgh.) Civil No. 79-1597)

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**SUR PETITION FOR REHEARING**

Present: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER, BECKER and VAN DUSEN,
*Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Adams and Hunter would grant the petition for rehearing.

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

Statement of Judge Adams:

Judge Adams believes that the damages rule established in this case — that inflation and interest rates will be deemed to offset one another so that no discount to present value is necessary — is likely to have considerable consequences for a great many subsequent cases. Although it may be that economic conditions warrant this dramatic change in our system of calculating damages, the presence at this time of very high interest rates and substantially reduced inflation would suggest caution in adopting a rule that appears to be premised on some immutable relationship between interest and inflation. Even if the newly-adopted damages rule is appropriate under today's economic situation, institution of the rule is a matter of unusual importance that merits consideration by the full Court. Moreover, because the rule implicates interests and affects parties in a wide range of litigation settings, rehearing in banc would provide an opportunity for this Court to consider amicus briefs from other groups concerned with the damages rule. Accordingly, he dissents from the denial of rehearing in banc.

Judge Hunter also would grant rehearing and joins in Judge Adams' statement.

BY THE COURT,

RUGGERO J. ALDISERT

*Circuit Judge*

Dated: May 20, 1982

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

**A True Copy:**

**Teste:**

*Clerk of the United States Court of Appeals for the Third Circuit*

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Owner or owner pro hac vice of
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*Appellant*

(W.D.Pa. (Pgh.) Civil No. 79-1597)

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**AMENDMENT**
**SUR PETITION FOR REHEARING**

Judge Adams' statement granting petition for rehearing in the above, filed on May 20, 1982, is to be amended to include a footnote following the second sentence in that statement, to read as follows:

1. Other Courts of Appeals have considered the problem of accounting for inflation in damage awards, and have arrived at outcomes that are somewhat at variance with the rule adopted here. The Second Circuit, for example, after reviewing economic literature in the field, ruled that damage awards should still be discounted to reflect a "real" interest rate, untainted by inflation, estimated at about one to two percent. *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39-40 (2d Cir. 1980); *accord, O'Shea v. Riverway Towing Co.*, No. 81-1924, Slip Op. at 9-12 (7th Cir. Apr. 27, 1982). The Fifth Circuit, which has until now applied a higher discount rate, recently voted to reconsider in banc the

proper treatment of inflation in calculating damage awards. *Byrd v. Reederei*, 638 F.2d 1300, *rehearing granted*, 650 F.2d 1324 (5th Cir. 1981).

BY THE COURT,

ARLIN M. ADAMS

*Circuit Judge*

Dated: June 1, 1982

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 81-1928

---

HOWARD E. PFEIFER,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Owner or owner *pro hac vac vice* of Barges
1011, 1384, 1400, 1363, and others in a fleet,
*Appellant.*

---

(D. C. Civil No. 79-1597)

On Appeal from the United States District Court
for the Western District of Pennsylvania.

---

Present: Aldisert, Van Dusen and Garth,
*Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on March 18, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court, entered April 16, 1981, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:
SALLY MRVOS
*Clerk.*

April 16, 1982.

---

Certified as a true copy and issued in lieu of a formal mandate on May 28, 1982.

Costs taxed in favor of appellee as follows:

| | |
|---|---|
| Brief | $184.75 |
| TOTAL | $184.75 |

Test:

M. ELIZABETH FERGUSON,
*Chief Deputy Clerk,*
*United States Court of Appeals*
*for the Third Circuit.*

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

UNITED STATES COURT OF APPEALS
For the Third Circuit

June 8, 1982

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No. 81-1928

---

HOWARD E. PFEIFER,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Owner or owner *pro hac vac vice* of Barges
1011, 1384, 1400, 1363, and others in a fleet,
*Appellant.*

---

(D. C. Civil No. 79-1597)

---

Present: Aldisert.

1. Motion by appellant for stay of mandate which the Court may wish to treat as a motion to recall the mandate;

2. Answer by plaintiff-appellee to motion for stay of mandate;

3. The opinion was filed and judgment entered on April 16, 1982. An order denying appellant's petition for rehearing *en banc* was filed May 20, 1982.

*Appendix A—Opinion of the Third Circuit Court of Appeals.*

The certified judgment in lieu of formal mandate issued on May 28, 1982;

in the above-entitled case.

Respectfully,

SALLY MRVOS/(Illegible)
*Clerk*

mmd
Enc.

---

The foregoing Motion is/are granted and the mandate is recalled. Appellant is directed to notify the Clerk when the Petition for Certiorari is filed or alternatively, if it is decided that no such Petition will be filed.

BY THE COURT,

ALDISERT,
*Judge.*

Dated: June 11, 1982.

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## APPENDIX B.

**Opinion of the District Court for Western District of Pennsylvania**

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

---

HOWARD E. PFEIFER,

*Plaintiff,*

vs.

JONES & LAUGHLIN STEEL CORPORATION, owner or owner *pro hac vice* of Barges 1011, 1384, 1400, 1363 and others in a fleet,

*Defendant.*

---

Civil Action No. 79-1597.

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### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Howard E. Pfeifer, brought this action pursuant to the Longshoremen's & Harbor Worker's Compensation Act, §5(b), *as amended*, 33 U.S.C. §905(b), to recover damages from defendant, Jones & Laughlin Steel Corporation, for personal injuries allegedly sustained as the result of defendant's negligence. Pursuant to Fed. R. Civ. P. 52, we make the following Findings of Fact and Conclusions of Law.

*Findings of Fact*

1. Plaintiff is an individual residing at Box 126-A, R.D. #1, Ford City, Armstrong County, Pennsylvania 16226.

2. Defendant is a corporation with its principal place of business in Pittsburgh, Allegheny County, Pennsylvania.

3. Defendant corporation is engaged, *inter alia*, in the business of owning and operating a fleet of vessels, boats and barges upon the Ohio, Monongahela and Allegheny Rivers and their tributaries, all of which are navigable waters of the United States.

4. At the time of plaintiff's accident, the defendant had a fleet of approximately thirty-five coal barges at its No. 1 landing on the north side of the Monongahela River and used said vessels in the aforementioned navigable waters of the United States. At all times hereinafter mentioned, defendant owned, managed and operated, or was owner *pro hac vice*, of said vessels.

5. Plaintiff was permanently employed by defendant for nineteen years as a landing helper on defendant's coal barges. The defendant moved barges to and from its by-products plant on the Monongahela River, and plaintiff aided in loading and unloading the barges at that plant.

6. On January 13, 1978, plaintiff reported to work at landing No. 1 at 12:00 A.M. Defendant assigned plaintiff the duties of a "head man." (Although ordinarily classified as a landing helper, plaintiff worked as head man when the regular head man was absent because of illness or vacation).

7. Plaintiff's duties on January 13, 1978 consisted of moving loaded barges of coal to the coal hoist or elevator to be emptied into defendant's coal bins, moving the

empty barges away from the coal hoist, and tying them with other barges to be joined in a fleet and moved away. Plaintiff's duties also included filing reports, inspecting the loaded barges in the fleet for possible leaks, and, when necessary, pumping water out of the leaking barges.

8. Two other bargemen or bargehelpers, Walter Tadder and Harvey Hicks, assisted plaintiff in his duties on January 13, 1978.

9. Plaintiff's accident occurred during the 12:00 A.M. to 8:00 A.M. shift on that date.

10. There was an accumulation of snow and ice on the gunnels of the barges where plaintiff was working. A weather report (Plaintiff's Exhibit "2") indicates that the temperature was 22 degrees, that there had been a two-inch accumulation of snow on January 12, 1978, and that an additional inch of snow fell between 12:50 A.M. and 6:50 A.M. (hours included in plaintiff's shift) on January 13, 1978.

11. It was customary at the No. 1 landing to have salt stored for use in salting the gunnels of the barges and dissolving ice on the loads of coal. The salt was usually available in five-gallon paint buckets. It also was customary for additional personnel to be used when there were snowy and icy conditions. This procedure was sometimes referred to as "doubling out."

12. At approximately 12:30 A.M., plaintiff requested salt from the shift foreman, Sherman Haddex. Haddex responded that he had no one available to deliver the salt.

13. In addition to requesting salt, plaintiff asked the shift foreman for additional help in shovelling snow off of the gunnels.

14. No snow was shoveled from the barges during plaintiff's shift because the men working that shift were busy moving barges and attending to a sinking barge. (Some barges had broken loose earlier that night, requiring an additional motor vessel to come up and bring them back into the fleet. This reduced the time available to attend to the sinking barge earlier or to shovel snow and ice. In addition, the third man on the shift that night, Harvey Hicks, was quite inexperienced and therefore provided less help than an experienced man might have in moving the barges and taking care of the fleet. In fact Tadder had to stay close to Hicks most of the time because the weather conditions, together with Hicks' inexperience, caused Tadder to be concerned about Hicks' safety.)

15. OSHA regulations (Plaintiff's Exhibit "11," pages 102, 103) required defendant to remove the snow from the gunnels of barges and not allow a slippery surface. Defendant failed to comply with these governmental safety regulations and the safety and health regulations for longshoremen.

16. At the start of plaintiff's shift, one of the barges in the fleet was leaking, and one pump in a gunnel at the quarter head of the barge was in operation. The leaking barge had a full load of coal.

17. At about 4:00 A.M., plaintiff learned that the leaking barge was starting to sink, and upon inspection

the men on the 12:00-8:00 A.M. shift decided that the barge needed an additional pump in its bulkhead.

18. The pumps available on the night of plaintiff's accident were more cumbersome and not as easy to connect to the electrical system as the pumps which were usually supplied.

19. The pump that plaintiff used that night consists of three parts: a leg or tube of metal approximately eight feet long with a propellor at the bottom, weighing between 80 and 90 pounds; a 12-inch by 18-inch electric motor weighing approximately 80 pounds; and an electrical connection. The operation of this pump requires the insertion of an electrical line that was rolled from a heavy spool. Ordinarily three men are needed to assemble the pump.

20. Walter Tadder went to get the leg of the pump; Harvey Hicks went to get the electrical wiring, and plaintiff went to the pump barge and found a motor and breaker box. Plaintiff proceeded to walk from the pump house across the gunnel of a barge carrying the motor on his right shoulder and the breaker box, which weighs approximately 5 pounds, in his left hand. He had traversed three quarters of the barge gunnel and had reached the quarter head in view of Tadder, who was on the sinking barge, when both of his feet went out from under him because of the ice and snow accumulated on the gunnel of the barge.

21. Plaintiff could not break his fall because he was carrying the motor and breaker box. Plaintiff struck a barge rail and landed on his tailbone, with the motor falling onto his lap.

22. Plaintiff complained that his neck and the right side of his back were sore. (Plaintiff's medical case record (Plaintiff's Exhibit "4") states that plaintiff suffered mild soreness to the nape of his neck, and a mo erate severe contusion to the coccygeal region with swelling and that he complained of soreness in his thoracic lumbar region.)

23. Walter Tadder, who saw plaintiff fall, took the motor off of plaintiff's lap, and together with Hicks, inserted the motor into the pipe while plaintiff held a flashlight.

24. The sinking barge was only 2½ to 3 inches above the water when plaintiff was carrying the pump motor, and it therefore presented an emergency situation.

25. The testimony of defendant's witnesses regarding the use of salt on gunnels was contradictory. David Curran testified that the men do not salt the gunnels, whereas Sherman Haddex, the foreman, testified that they do.

26. Haddex stated in his accident report that "not putting salt on icy barges" was an unsafe practice. (Plaintiff's Exhibit "3," Line 18).

27. The report went on to note that in order to prevent similar accidents, the river crew was to be instructed to salt the gunnels of the barges. (Plaintiff's Exhibit "3," Line 26).

28. Defendant, through Mr. Haddex, admits that "ice on gunnels of barges" is an unsafe condition (Plaintiff's Exhibit "3," Line 19).

29. The day of the accident, plaintiff went to defendant's dispensary to get medication and to have X-rays taken. Plaintiff was taken from the dispensary to South Side Medical Center where more X-rays were taken.

30. Plaintiff's back was black and blue and swollen below the belt line immediately after his fall.

31. In April, 1978, defendant's plant physician, Dr. Anas El Attar, prescribed physical therapy for plaintiff. On January 20, 1978, Dr. El Attar had certified that plaintiff could return to work without restrictions immediately, but plaintiff did not. Between April, 1978 and April, 1979, plaintiff went to Citizens General Hospital in New Kensington for physical therapy fifty-eight times.

32. At defendant's request, plaintiff was seen in consultation with neurosurgeons, Hershey, Gray & Palmer, and by Dr. Danilo L. Enriquez. None of these doctors required plaintiff to undergo any additional treatment or medical procedures. None of the consultant physicians recommended that plaintiff return to work.

33. Dr. Enriquez performed electromyographic studies, the results of which were consistent with a motor neuron disease.

34. Dr. El Attar issued a certificate stating that as of March 16, 1979, the plaintiff was totally disabled as a result of (a) advanced degenerative osteoarthritis of the spine, cervical, thoracic and lumbar, (b) partial blindness, and (c) generalized muscular dystrophy.

35. In his testimony, Dr. El Attar stated that the term "muscular dystrophy" was not used in its popular sense, but rather, was used to describe a muscular weakness in order to help plaintiff qualify for the medical disability pension that he had requested.

36. Dr. El Attar testified that there was no disability whatsoever as of March 16, 1979 as a result of the alleged injuries of January 13, 1978, but plaintiff could not be reemployed by Jones and Laughlin as a result of Dr. El Attar's findings of March 16, 1979.

37. Joseph Novak, M.D., a Board certified physician, examined plaintiff on May 22, 1979 at the request of the Hartford Insurance Company; he subsequently testified on behalf of plaintiff. Plaintiff had no independent medical treatment or examination of his own choosing.

38. Plaintiff could not do a sit up, had limited range of motion in his back, and no muscle tone. He had soreness and pain that felt like he was "sitting on golf balls," neck pain, continuous headaches (occipital and frontal), low back pain and pain in both hips. He had to go to bed early at night because of increasing pain; he had been taking pain medicine.

39. Dr. Novak's examination revealed that plaintiff is skinny, muscular, walks stooped forward, has a flattening of his lumbar lordosis, and has some limitation of motion of his lumbar spine, but that plaintiff willingly went through the requested maneuvers. Plaintiff was able to walk on his tiptoes and heels without any difficulty and had no sciatic stretch pain on straight leg raising; his reflexes were 3 plus and active in both legs; there

were no atrophies visible and his muscles were normal. Plaintiff told Dr. Novak that he was unable to do a sit up because of low back pain.

40. It was Dr. Novak's opinion, within a reasonable degree of medical certainty, that the fall of January 13, 1978 was a superimposed trauma on the pre-existing condition of degenerated arthritis to the lumbar and cervical spine.

41. It was also Dr. Novak's opinion, within a reasonable degree of medical certainty, that plaintiff was permanently disabled and unable to do the work that he formerly had performed.

42. Dr. Novak stated that it was his opinion that plaintiff was limited to a very restricted, sedentary, light type of work and that he knew of no light duty that could be performed in defendant's place of business.

43. Dr. Novak testified that he had reviewed the report of Dr. El Attar and Dr. Enriquez and found no indication of a muscular dystrophy as reported by Dr. El Attar. He criticized diagnosis and further stated that he was eminently qualified to disagree with Dr. El Attar on the diagnosis. Dr. Novak further testified that he did not feel that Dr. Enriquez's diagnosis was correct and speculated that he was practicing defensive medicine in regard to his diagnosis of motor neuron disease, which he depicted as "The Lou Gehrig Disease." Dr. Novak stated that in his opinion plaintiff did not have a motor neuron disease and that plaintiff would not be here today if he had it.

44. Dr. Novak testified that in his opinion, osteoarthritis can be present in a person for twenty years without the person knowing of this condition. It was his opinion, within a reasonable degree of medical certainty, that the trauma, that is, plaintiff's fall on January 13, 1978, superimposed on his existing arthritis, caused plaintiff's present permanent disability and his inability to perform his former occupation.

45. When plaintiff underwent physical therapy treatments at Citizens General Hospital, New Kensington, Pa. (see finding No. 31), it was under the supervision of Dr. El Attar. He was also seen by other physicians and given medication.

46. Dr. El Attar testified that by March of 1979, plaintiff could have been active and could have lifted fifty pounds. Dr. Novak felt that plaintiff was capable of carrying ten to twenty-five pounds and could have held a job that might involve sitting, standing, walking or driving for periods of up to two hours, but at the end of such a two-hour period he would have to rest.

47. We find that after July 1, 1979, plaintiff would have been capable of doing light work which could involve lifting weight of not more than twenty-five pounds.

48. Defendant never offered plaintiff a job of any type after his injury. There were never any discussions between defendant and plaintiff regarding the availability of a light duty job.

49. The plaintiff could not work on the river.

50. Plaintiff's annual wage in 1978 was $26,065.

51. As of October 31, 1980 (the date of trial), plaintiff had received payments of $33,079.14 under the Longshoremen's and Harbor Workers' Compensation Act.

52. The legal minimum hourly wage in the United States in 1979 was $2.90, or $6,032 per year ($2.90 x 2080 hours).

53. Plaintiff has a seventh grade education and has no job experience other than heavy, outdoor, strenuous, laboring-type work. He had worked steadily for the defendant for nineteen years and was considered a good worker.

54. Plaintiff applied for two jobs after the accident but was unable to pass the physical examinations required.

55. Plaintiff was born on June 27, 1925, was approximately 52-1/2 years old when the accident occurred on June 13, 1978 and will be 65 years old on June 27, 1990, twelve and one-half years after the accident.

56. Plaintiff's work expectancy at the time of the accident was twelve and one-half years.

*Conclusions of Law*

1. This Court has jurisdiction pursuant to 28 U.S.C. §1333.

2. In 1972, Congress amended the Longshoremen's and Harbor Worker's Compensation Act of 1927 (hereinafter "LHWCA"), 33 U.S.C. §§901-950, fundamentally changing the basis for a longshoreman's action

against a vessel owner. Under the Act as amended, a vessel owner is no longer strictly liable for a longshoreman's injuries on the basis of unseaworthiness or nondelegable duty, or for a stevedore's negligence under a *respondent superior* theory. Imstead, "an owner [is] liable to an injured longshoreman only for its own negligence that proximately caused the injury." *McCarthy v. Silver,* 487 F. Supp. 1021, 1024 (E.D. Pa. 1980). *See Rich v. United States Lines, Inc.,* 546 F.2d 541, 545 (3d Cir. 1979).

3. The Third Circuit has held that "[Section] 905(b) imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a land based business." *Griffith v. Wheeling-Pittsburgh Steel Corp.,* 610 F.2d 116, 125 (3d Cir. 1979), *appeal pending,* 444 U.S. 1042 (1980).

4. Applying this standard, the *Griffith* court stated that a vessel could be found negligent on a showing: (1) that the vessel knew of or by exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would impose an unreasonable risk of harm to a longshoreman working on board the ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoreman against that danger. *Id.* at 126.

5. In *Griffith,* a barge was delivered to a steel company's landing by a riverboat company and was incorporated into a fleet there under the supervision of the steel company's dock foreman. The barge was in the ex-

clusive possession of the steel company until the time of the accident; its movement was the responsibility of the foreman, and the steel company was free to choose which barge it would use for steel products. The Third Circuit found that these facts fit squarely within *Blair v. United States Steel Corp.*, 444 F.2d 1390 (3d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972), in which the Court held that a bailee in exclusive possession of a river barge is the owner *pro hac vice* of the vessel.

6. We find that the defendant, Jones & Laughlin Steel Corporation, was the owner *pro hac vice* of the barges in the fleet at its No. 1 landing on January 13, 1978.

7. Applying the standard of care set forth in *Griffith* to the facts of this case, we find that defendant, as owner *pro hac vice* of the barge on which plaintiff was injured, was negligent.

8. The weather report shows that there was an accumulation of snow and ice on the gunnels at the time of plaintiff's accident. Prior to the accident, defendant had requested salt, as well as additional workmen to shovel the snow.

9. Thus, the defendant knew of the condition on board the vessel that led to plaintiff's injury, knew that the condition imposed an unreasonable risk of harm to longshoremen working on the vessel, and failed to exercise reasonable care to protect the longshoremen against danger.

10. The evidence presented demonstrated that plaintiff slipped and fell on the snow and ice that defendant had allowed to accumulate on the gunnels of the barge, *i.e.*, defendant's failure to provide salt, or to salt the gunnels, and its failure to provide additional help to shovel snow and clear ice off the gunnels were the proximate causes of plaintiff's injury.

11. A longshoreman may recover damages for injuries he sustained if he demonstrates that the owner was negligent in failing to correct a dangerous condition of the vessel not created by the employee, and that the owner's negligence was the proximate cause of his injury. In this case, the dangerous condition caused by the snow and ice was created prior to and during plaintiff's shift and defendant had notice of the condition as a result of plaintiff's request for salt and additional help in shovelling the gunnels of the barges prior to his accident.

12. There was no contributory or comparative negligence on the part of plaintiff.

*Damages*

1. On the basis of our Findings of Fact, we must award damages to plaintiff based on the following: 1) his complete inability to work from January 13, 1978, the date of the accident, until July 1, 1979, after which time we have found that plaintiff was capable of doing light work; 2) his reduced capacity for work from July 1, 1979 until his presumed date of retirement on his 65th birthday, June 27, 1990; and 3) pain, suffering, and inconvenience sustained.

2. Counsel for plaintiff has submitted, as proposed damages, a computation of plaintiff's estimated wages as an employee of the defendant from the date of the accident until his presumed date of retirement. He has included in this proposal cost of living raises predicated on the recent history of defendant's wage rates. We do not disagree with these projections, but feel they are inappropriate in view of the holding in *Kaczkowski v. Bolubasz*, _____ Pa. _____, 421 A.2d 1027 (1980).

This case sets forth a new procedure for covering damages in personal injury cases. The Supreme Court of Pennsylvania stated that

> Henceforth, in this Commonwealth, damages will be awarded for lost future earnings that compensate the victim to the full extent of the injury sustained. Upon proper foundation, the court shall consider the victim's lost future productivity. Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the courts of this Commonwealth are instructed to abandon the practice of discounting lost future earnings.

*Id.* at _____. 421 A.2d at 1038-39.

3. We believe that it would be inconsistent with the *Kaczkowski* decision to build into a damage award projected cost of living increases, since this would give plaintiff a double consideration for inflation; it would permit plaintiff to have the advantage of the *Kaczkowski* case in which inflation is presumed to offset future interest rates while at the same time allowing him to insert cost of living increases into the award.

4. We have found that the plaintiff could have taken up light work on July 1, 1979. We take judicial notice of the fact that at that time the minimum hourly wage was $2.90. We disregard cost of living increases in the United States minimum wage law in our computations for the same reasons as noted above with respect to projected cost of living increases paid by the defendant to its employees. Accordingly, we do not consider in our computations the subsequent raises which have brought the minimum wage up to $3.35/hour currently, nor do we consider possible future increases.

5. As of the time of trial, plaintiff had received $33,079.14 in benefits under LHWCA. These will be an offset to the damage award, as will any such payments received by the plaintiff since that time.

6. We have computed the award as follows. At the time of the accident, plaintiff's annual wage was $26,025, and he had a work expectancy of 12.5 years.

| | |
|---|---|
| $ 26,025 | |
| x12.5 | |
| $325,312.50 | projected earnings without regard for inflation or cost of living increases. |

Plaintiff could have taken up light work on July 1, 1979. We assume he would have earned the minimum wage for the rest of his working life. He had a work expectancy at that time of 11 years. At $2.90 per hour, his annual wage would have been $6,032.

| | |
|---|---|
| $ 6,032 | |
| x11 | |
| $66,352 | projected earnings at minimum wage. |

We do not believe that there was sufficient evidence to establish a basis for estimating increased future productivity for the plaintiff, and therefore we will not inject such a factor in this award.

We believe that plaintiff is entitled to an award of $50,000 for his pain and suffering. In sum, we compute plaintiff's award as follows:

| | |
|---|---|
| $325,312.50 | projected earnings at present wage |
| −66,352.00 | projected earnings at minimum wage |
| $258,960.50 | |
| +50,000.00 | pain and suffering |
| $308,960.50 | judgment |
| −33,079.14 | less compensation paid to date of trial |
| $275,881.36 | final judgment less any compensation paid from date of trial to date of payment. |

An appropriate order will be entered.

MAURICE B. COHILL, JR.
*United States District Judge*

*Appendix B—Opinion of the District Court for Western District of Pennsylvania.*

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

---

HOWARD E. PFEIFER,

*Plaintiff,*

vs.

JONES & LAUGHLIN STEEL CORPORATION,
owner or owner *pro hac vice* of Barges 1011,
1384, 1400, 1363 and others in a fleet,

*Defendant.*

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Civil Action No. 79-1597.

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ORDER

AND NOW, to-wit, this 15th day of April, 1981, for the reasons set forth in the accompanying opinion, it is ORDERED, ADJUDGED and DECREED that judgment be and the same hereby is entered in favor of the plaintiff and against the defendant in the amount of $275,881.36 less any benefits received by plaintiff under the Longshoremen's and Harbor Worker's Compensation Act from October 30, 1980, the date of trial, until the date of payment of the judgment by defendant.

MAURICE B. COHILL, JR.
*United States District Judge*

cc: Jerome M. Libenson, Esq.
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